93-691

SUPREME COURT, U.S.
FILED
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

IN THE MATTER OF THE ESTATE OF:
NELLIE MAY WILSON, DECEASED
ERMA JEAN PHIPPS, Petitioner

v.

ROBERTA K. WILSON, EXECUTRIX OF THE ALLEGED LAST WILL AND TESTAMENT OF THE DECEASED, NELLIE MAY WILSON;
and ROBERTA K. WILSON, Respondent

PETITION FOR WRIT OF CERTIORARI

Daniel S. Davisson
DAVISSON & DAVISSON, P.C.
1111 Meridian Plaza
Anderson, Indiana 46016
(317) 643-6657

Counsel of Record

David W. Stone IV
STONE Law Office & Legal Research
26 W. 8th Street., P.O. Box 1322
Anderson, Indiana 46015
(317) 644-0331

Attorneys for Petitioner

Question Presented for Review

Do the provisions of the Indiana Probate Code violate the due process clause of Fourteenth Amendment to the United States Constitution by not requiring that a person who would inherit if a decedent died intestate be given notice of the probate of a will which disinherits such person?

List of Parties in the Proceedings in the Court Below

Erma Jean Phipps is the petitioner here and was the petitioner in the trial court and the appellant in the state appellate proceedings.

Roberta K. Wilson was a respondent in the trial court proceedings and an appellee in the state appellate proceedings both as executrix of the last will and testament of the deceased Nellie May Wilson and as an individual.

Table of Contents

	page
Question Presented for Review	i
List of Parties to the Proceedings in the Court Below	ii
Table of Authorities	iv
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provision, Treaties, Statutes, Rules and Regulations Involved	1
Statement of Case	5
Reasons for Granting Writ	6
Conclusion	14
Appendix:	
A. Opinion of the Trial Court	A1
B. Opinion of the Court of Appeals of Indiana	A3

Table of Authorities

CASES

Altshuler v. Minkus-Whalen, 31 Mass.App.Ct. 937, 579 N.E.2d 1369 (1991) 9

Board of Regents of State College v. Roth(1972), 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 . . . 10

Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971) 9

Buchanan v. Warley, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917) 8

Dickman v. Commissioner of Internal Revenue, 465 U.S. 330, 104 S.Ct. 1086, 79 L.Ed.2d 343 (1984) 8

Fidelity & Deposit Co. of Maryland v. Arenz (1933), 290 U.S. 66, 54 S.Ct. 16, 78 L.Ed. 176 8

Gano Farms, Inc. v. Estate of Kleweno, 2 Kan.App.2d 506, 582 P.2d 742 (1978) 10

Garner v. Harrison (1991), 260 Ga. 866, 400 S.E.2d 925 10

Giaccio v. Pennsylvania, 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966) 8

Goldberg v. Kelly, (1970), 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 8

Hebert v. Louisiana, 272 U.S. 312, 47 S.Ct. 103, 71 L.Ed. 270 (1926) 11

Holden v. Hardy, 169 U.S. 366, 18 S.Ct. 383, 42 L.Ed. 780 (1898) 8

In Matter Estate of Lawver, 86 Or.App. 711, 740 P.2d 1215 (1987) 10

Jago v. Van Curen (1981), 454 U.S. 14, 102 S.Ct. 31, 70 L.Ed.2d 13 10

Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) 8

Table of Authorities—*(Continued)*

CASES

Matter of Estate of Weidman (1991), Iowa, 476 N.W.2d 361 7

Matter of Estate of Wilson, 610 N.E.2d 851 (Ind.App., 1993) 1, 6

Mennonite Board of Missions v. Adams, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983) 11

Morris v. Mull (1924), 110 Ohio St. 623, 144 N.E. 436 9

Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) 8, 9

North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975) 10

Palazzi v. Estate of Gardner (1987), 32 Ohio St.3d 169, 512 N.E.2d 971 10

Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.E.2d 570 (1972) 8

Reardon v. Whalen, 306 Mass. 579, 29 N.E.2d 23 (1940) 10

Smith v. Estate of King, 579 So.2d 1250 (Miss., 1991) 9

Succession of Hearn (1982), La.App., 412 So.2d 692 9

Taylor v. Hayes, 418 U.S. 488, 94 S.Ct. 2967, 41 L.Ed.2d 897 (1974) 9

Todd v. Ehresman, 132 Ind.App. 440, 175 N.E.2d 425 (1965) 13

Tulsa Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988) 6, 7, 11, 13

Table of Authorities—*(Continued)*

CONSTITUTIONAL PROVISION

United States Constitution Fourteenth Amendment i, 1, 7

STATUTES

28 U.S.C. § 1257(a) 1

Indiana Code § 29-1-2-1 13

Indiana Code § 29-1-7-4 . . . . . 1, 14

Indiana Code § 29-1-7-7 . . . . . 2, 8, 9, 14

Indiana Code § 29-1-7-17 . . . . . 4, 14

Uniform Probate Code § 3-705 13

TEXTBOOKS

Falender, *Henry's Indiana Probate Law and Practice* (8th ed.) § 307 11

Falender, *Notice to Creditors in Estate Proceedings: What Notice is Due?*, 63 N.C.L.Rev. 659 (1983) 11

Jaeger, *Williston on Contracts (3rd ed.)* § 1681A 10

Opinions Below

The decision of the Circuit Court of Madison County, Indiana, dismissing the will contest was entered June 15, 1992.

The judgment of the Court of Appeals of Indiana was entered March 10, 1993. The opinion is reported as *Matter of Estate of Wilson*, 610 N.E.2d 851-8 (Ind.App., 1993).

The petition for rehearing was denied by the Court of Appeals of Indiana without opinion on May 17, 1993.

The Petition to Transfer to the Supreme Court of Indiana was denied without opinion on August 2, 1993.

Statement of Jurisdiction

The Supreme Court of Indiana denied a petition to transfer on August 2, 1993. This petition for certiorari was filed less than 90 days from that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

Constitutional Provisions, Treaties, Statutes, Rules and Regulations

The relevant portion of the 14th Amendment to the United States Constitution says in part:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .

Indiana Code § 29-1-7-4 states:

> Any interested person or a personal representative named in the will may petition the court having jurisdiction of the administration of the decedent's estate:
>
> (a) To have the will of such decedent, whether the same is written or is unwritten, is in his possession or not, is lost, destroyed, or without the state, probated;
>
> (b) For the issuance of letters testamentary to the executor named in said will for the administration of said estate;

(c) For the appointment of an administrator with the will annexed is no executor is designated in said will or if the person so designated with not qualified, dead or refuses to serve;

(d) For the appointment of an administrator of the estate of any person dying intestate.

A petition for probate may be combined with a petition for the issuance of letters testamentary, or as administrator with the will annexed, and a person interested in the probate of a will and in the administration of the estate may petition for both.

No notice that a will is to be offered for probate or that it has been probated shall be required.

No notice of the filing of, and hearing on, the petition described in this section shall be given to, or served, upon any person. If the petition described herein is filed in term time, it shall be heard forthwith by the court, and if filed in vacation it shall be heard by the judge of said court if present, or in his absence by the clerk of the said court.

Indiana Code § 29-1-7-7 states:

Notice of appointment of personal representative—Creditors to file claims—Form of notice.— (a) As soon as letters testamentary or of administration, general or special, supervised or unsupervised, have been issued, the clerk of the court shall publish notice of the estate administration.

(b) The notice required under subsection (a) shall be published in a newspaper of general circulation, printed in the English language and published the county where the court is located, once each week for two (2) consecutive weeks. A copy of the notice, with proof of publication, shall be filed with the clerk of the court as a part of the administration of the estate within thirty (30) days after the publication. If no newspaper is published in the county, the notice shall be published in a newspaper published in an adjacent county.

(c) The notice required under subsection (a) shall be served by mail on each heir, devisee, legatee and known credi-

tor whose name and address is set forth in the petition for probate or letters. The personal representative shall furnish sufficient copies of the notice, prepared for mailing, and the clerk of the court shall mail the notice upon the issuance of letters.

(d) The personal representative or the personal representative's agent shall serve notice on each creditor of the decedent:

(1) Whose name is not set forth in the petition for probate or letters under subsection (c);
(2) Who is known or reasonably ascertainable within three (3) months after the first publication of notice under subsection (a); and
(3) Whose claim has not been paid or settled by the personal representative.

The notice may be served by mail or any other means reasonably calculated to ensure actual receipt of the notice by a creditor.

(e) Notice under subsection (d) shall be served within three (3) months after the first publication of notice under subsection (a) or as soon as possible after the elapse of three (3) months. If the personal representative or the personal representative's agent fails to give notice to a known or reasonably ascertainable creditor of the decedent under subsection (d) within three (3) months after the first publication of notice under subsection (a), the period during which the creditor may submit a claim against the estate includes the period specified under IC 29-1-14-1 and an additional period ending two (2) months after the date notice is given to the creditor under subsection (d). However, a claim subject to this subsection may not be filed more than one (1) year after the death of the decedent.

(f) A schedule of creditors that received notice under subsection (d) shall be delivered to the clerk of the court as soon as possible after notice is given.

(g) The giving of notice to a creditor or the listing of a creditor on the schedule delivered to the clerk of the court does

not constitute an admission by the personal representative that the creditor has an allowable claim against the estate.

(h) If any person entitled to receive notice under this section is under a legal disability, notice may be served upon or waived by the person's natural or legal guardian or by the person who has care and custody of the person.

(i) The notice shall read substantially as follows:

NOTICE OF ADMINISTRATION

In the _____ Court of _____ County, Indiana.

Notice is hereby given that _____ was on the ____ day of _____, 19__, appointed personal representative of the estate of _____ deceased.

All persons having claims against said estate, whether or not now due, must file the same in said court within five (5) months from the date of the first publication of this notice or said claims will be forever barred.

Dated at _____, Indiana, this ____ day of _____, 19__.

_____

CLERK OF THE _____ COURT
FOR _____ COUNTY, INDIANA

Indiana Code § 29-1-7-17 states:

Action to contest will—Limitation—Complaint—Parties.—Any interested person may contest the validity of any will in the court having jurisdiction over the probate of the will within five (5) months after the date of the order admitting the will to probate by filing in the court the person's allegation in writing verified by affidavit, setting forth:

(1) The unsoundness of mind of the testator;

(2) The undue execution of the will'

(3) That the will was executed under duress or was obtained by fraud; or

(4) Any other valid objection to the will's validity or the probate of the will.

The executor and all persons beneficially interested in the will shall be made defendants to the action.

Statement of the Case

In 1990, Nellie Wilson was found by local police in a confused and wandering state. She was 79 years old. On March 13, 1990, a petition for the appointment of a guardian over her was filed by an investigator for the Adult Protective Services of Region One, State of Indiana. The petition was supported by a physician who had examined her and found her to be suffering from periods of confusion and short term memory.

Notice of the guardianship proceedings was given to the petitioner and to Roberta K. Wilson whose counsel entered his appearance on her behalf and on behalf of Nellie Wilson on March 27, 1990.

On March 16, 1990, Nellie Wilson signed a will which gave all her property to Roberta Wilson who was a niece by marriage and ineligible to inherit by intestate secession, and named her as Executrix of her estate. Erma Phipps was the niece and nearest blood relation of Nellie Wilson and would have taken her estate under the laws of intestate secession under the laws of the state of Indiana.

The will was prepared and witnessed by the same attorney who appeared in the guardianship proceedings on behalf of Roberta Wilson and who represented Roberta Wilson as Executrix in these proceedings.

Nellie Wilson died December 6, 1990. Her will was admitted to probate on December 11, 1990.

Roberta Wilson and her attorney knew of the existence of Erma Phipps and her location.

Erma Phipps was hospitalized for many weeks after the death of her aunt. Following her hospitalization and a partial recovery she attempted to contact her aunt and then learned of her aunt's death

for the first time in approximately December of 1991. On December 27, 1991, while the estate was still open but after the time period had run under Indiana law for the filing of an action to contest a will the petitioner filed a will contest. The Estate on January 24, 1992, filed a motion to dismiss the will contest on the ground it was untimely.

The challenge to the constitutionality of the probate law of Indiana permitting a will to be probated that disinherits the person who would otherwise take the estate of the decedent if such decedent had died intestate without notice to such heir was raised on March 5, 1992, in Petitioner's response to the motion to dismiss the will contest. The state trial court rejected the petitioner's claim that the lack of notice denied her due process of law and ordered the dismissal of the will contest on June 15, 1992.

On the direct appeal to the Court of Appeals of Indiana, the petitioner again argued that the state statutes denied her due process of law by not affording her personal notice of the probate of the will which disinherited her. The Court of Appeals of Indiana also rejected the argument. The same argument was raised in the Indiana Supreme Court which declined to review the case.

Reasons for Granting Writ

This case presents an opportunity for this Court to resolve the conflict that has arisen among the states as to the character of the right or interest to take property under the laws of intestate secession and whether due process requires that a person whose existence and address are known and who, but for the probate of a will, would take an estate, is entitled to receive notice of such probate of the will so that she is afforded an opportunity to contest it.

The Court of Appeals of Indiana concluded that the petitioner was not entitled to receive notice of the probate of the will because her interest as an heir was a "mere expectancy" and as such did not qualify as property for purposes of due process protection. *Matter of Estate of Wilson*, 610 N.E.2d 851, 858 (Ind.App., 1993).

To say, as the Court of Appeals of Indiana did, that there is no right entitled to due process protection, i.e. notice of a proceeding, unless the action which would be triggered by the notice is taken even in the absence of notice is no different than the position taken by the estate which was rejected by this Court in *Tulsa Collection*

Services, Inc. v. Pope, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988). There a creditor who did not file a claim against an estate within the statutory time period and who was not given personal notice of the fact that an estate had been opened was told by the state courts it was not denied due process when they held the claim was barred under the state statute which was a self-executing non-claim statute which did not require actual notice. This Court disagreed and held that the cause of action against the estate for an unpaid bill, while an intangible interest, was property protected by the Fourteenth Amendment. It was further held that due process required that readily identified creditors be given actual notice in order to have a chance to assert their claims. The cause of action of the petitioner in this case to contest the will was no less a protected property interest. She was stripped of that property interest without any notice of the pending proceedings. The Court of Appeals of Indiana justified this action on the ground she had no property interest entitled to due process notice protection due to her failure to file a will contest within the statutory time limits. The similarity of such reasoning to a dog chasing its tail is readily apparent. She was denied due process of law.

The Iowa Supreme Court has considered the same question which was decided by the Court of Appeals of Indiana and reached the opposite conclusion in *Matter of Estate of Weidman*, 476 N.W.2d 357 (Iowa, 1991). The Iowa probate statute only required notice by publication of the probate of a will. An heir argued that this denied him due process of law and that his right to contest the will could not be extinguished merely by notice by publication. The Iowa Supreme Court agreed holding that although in *Tulsa Collection Services, Inc. v. Pope*, *supra*, this Court did not extend its ruling beyond creditors of an estate, the rationale for this determination, however, should also apply to other interested parties, especially parties whose rights may be precluded by published notice. This case presents an excellent opportunity for this Court to resolve the question of whether a person who would take an intestate estate is entitled to notice of the probating of a will that changes such result under the due process clause or if such interest may be cut off after only service by publication to creditors of the probating of the will.

The petitioner submits that the reasoning of the Iowa Supreme Court is far more persuasive than the opinion by the Court of Ap-

peals of Indiana and is much more in harmony with past decisions of this Court.

Semantic labeling such as engaged in by the Court of Appeals of Indiana in an effort to justify not providing notice on the ground something is not a right as opposed to being a privilege has consistently been rejected by this Court. *Goldberg v. Kelly*, 397 U.S. 254, 262, 90 S.Ct. 1011, 25 L.Ed.2d 287, 295-6 (1970); *Perry v. Sindermann*, 408 U.S. 593, 602, 92 S.Ct. 2694, 33 L.E.2d 570, 580 (1972); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402, 86 S.Ct. 518, 15 L.Ed.2d 447, 450 (1966). The Indiana statutes which provided for intestate inheritance gave Mrs. Phipps a claim of entitlement to inherit unless she was disinherited by a valid will.

Property includes the right to acquire it. *Buchanan v. Warley*, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917); *Holden v. Hardy*, 169 U.S. 366, 391, 18 S.Ct. 383, 42 L.Ed. 780, 790 (1898). The right to acquire property through inheritance and to protect such right of inheritance by being able to contest an invalid will would properly fall without the scope of such classification of property and should be held entitled to the most fundamental due process protection, notice reasonably calculated to reach her, before she could lose the right to contest the will. The petitioner was given no notice. The only notice was a published notice to the creditors of the deceased and as to Petitioner it would be no more than a gesture. I.C. § 29-1-7-7. *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314-5, 70 S.Ct. 652, 94 L.Ed. 865, 873-4 (1950).

The concept of property includes intangible things. *Fidelity & Deposit Co. of Maryland v. Arenz*, 290 U.S. 66, 68, 54 S.Ct. 16, 78 L.Ed. 176, 178 (1933). It includes things terminable at will such as a right of occupancy under a tenancy at will. *Dickman v. Commissioner of Internal Revenue*, 465 U.S. 330, 336-7, 104 S.Ct. 1086, 79 L.Ed.2d 343, 350 (1984). The right to contest a will which could result in the right to receive the estate of the deceased falls within the scope of the concept of being property. The petitioner was deprived of that right without any notice of the pendency of the estate.

It has often been held by this Court and other courts throughout the nation that causes of actions do constitute a property right. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-9, 102 S.Ct. 1148, 71 L.Ed.2d 265, 273 (1982). It has also been held that the

right of access to the courts of a potential litigant is also of constitutional magnitude. *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971).

In this case, Mrs. Phipps was deprived of all right to challenge the execution of the will which deprived her of the inheritance she would otherwise have received. She was cut off from any opportunity to challenge the conduct of the executrix who was the sole beneficiary under such will in obtaining its execution. It cannot seriously be maintained that her right to litigate such a claim does not constitute a property right for due process purposes.

In this case no notice was given to Mrs. Phipps. Indiana law expressly states that no notice is required. I.C. § 29-1-7-7. The only "notice" given to Mrs. Phipps was newspaper publication of notice to creditors. This Court has noted that publication has historically been the means of notice used when the person giving notice does not really want to bring the matter to the attention of those who are affected by the action he wishes to take. *Mullane v. Central Hanover Bank and Trust Co., supra*. Due process considerations cannot be measured in terms of dollars or hours of delay. *Taylor v. Hayes*, 418 U.S. 488, 500, 94 S.Ct. 2967, 41 L.Ed.2d 897, 908 (1974). Here the address of Mrs. Phipps was know to the personal representative and her attorney. The cost of giving personal notice to her as opposed to only notice by publication would have been no more than that of a postage stamp.

A person who is a beneficiary under a will and is the personal representative has no incentive to see that persons who are disinherited by such will are notified of its probate. In fact they have an incentive to do the minimum necessary in the hope that such disinherited heirs will not discover the probate of the will in time to assert any infirmities with respect to the execution of such will just as a personal representative who also takes by intestate secession has an interest to conceal the existence of other heirs entitled to a share of the estate. Cf. *Altshuler v. Minkus-Whalen*, 31 Mass.App.Ct. 937, 579 N.E.2d 1369 (1991); *Smith v. Estate of King*, 579 So.2d 1250 (Miss., 1991); *Succession of Hearn*, 412 So.2d 692 (La.App., 1982); *Morris v. Mull*, 110 Ohio St. 623, 144 N.E. 436 (1924). The attitude of the executrix and beneficiary was clearly stated in her brief to the Court of Appeals of Indiana when she said that: "Roberta Wilson did everything that was required of

her and gave all of the notices which were required by Indiana law." (Appellee's brief p. 13 to the Court of Appeals of Indiana).

Other states have recognized by legislation that due process requires actual notice to heirs so that they have a real opportunity to contest wills that disinherit them. *In Matter Estate of Lawver*, 86 Or.App. 711, 740 P.2d 1215, 1219 (1987). It has also been held that an heir has more of a due process right to actual notification of the probate of a will that cuts off his right of inheritance than a creditor would have to notice of the opening of the estate. *Gano Farms, Inc. v. Estate of Kleweno*, 2 Kan.App.2d 506, 582 P.2d 742, 745 (1978). The Georgia Supreme has held that in order to comply with due process, a probate statute had to be construed so as to require that beneficiaries under a prior will which was revoked by a later will were entitled to notice so they would be able to contest the later will. *Garner v. Harrison*, 260 Ga. 866, 400 S.E.2d 925, 926-7 (1991).

This Court has held that principles of contract law serve as useful guides in determining if a constitutionally protected property interest exists. *Jago v. Van Curen*, 454 U.S. 14, 18, 102 S.Ct. 31, 70 L.Ed.2d 13, 17-8 (1981). A prospective right of inheritance may be the subject of contract and transferred by an assignment and at least in equity, the agreement will be enforced. Jaeger, *Williston on Contracts (3rd ed.)* § 1681A at page 701.

The interest of an heir as next of kin has been characterized as a property right and as a chose in action. *Reardon v. Whalen*, 306 Mass. 579, 29 N.E.2d 23 (1940). The ability to contest a will has been held to be a legally protected interest and entitled to constitutional protection. *Palazzi v. Estate of Gardner*, 32 Ohio St.3d 169, 512 N.E.2d 971 (1987). The interest of the Petitioner in her relative's estate may not be stripped of due process protection by the expediency of labeling it as an expectancy. The protection of due process does not depend upon the type of property which is involved. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 608, 95 S.Ct. 719, 42 L.Ed.2d 751, 758 (1975). Property and liberty interests are expansive and not frozen in time for purposes of due process protection. *Board of Regents of State College v. Roth*, 408 U.S. 564, 571-2, 92 S.Ct. 2701, 33 L.Ed.2d 548, 557 (1972). Permitting the right to contest a will to be lost where there has merely been notice by publication of the probate of the will because such interest is labeled a mere expectancy results in the

fossilization of the concept of what constitutes property and prevents growth to accommodate the realties of life.

The fact that the Indiana Probate Code does not require notice of the probate of a will to those who would have inherited if the deceased died intestate does not mean that due process is satisfied. As already covered, the right to contest a will is a species of property for purposes of due process protection. Although well known to the executrix, no notice was given to Mrs. Phipps, the person who would inherit the substantial estate, approximately one-half million dollars, except for the probate of a will of questionable validity. The only notice afforded being the obscure notice to creditors by publication.

As stated above it is no answer to say that the Indiana statute only required notice by publication and therefore due process is satisfied. The contents of state statutes are not determinative of what is required by due process. *Hebert v. Louisiana*, 272 U.S. 312, 47 S.Ct. 103, 71 L.Ed. 270 (1926). In *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 798-800, 103 S.Ct. 2706, 77 L.Ed.2d 180, 187-8 (1983) posted notice and notice by publication was the only notice required by the Indiana statute to be given to mortgagees. Nonetheless it was held that there was a denial of due process despite compliance with the requirements of the state statute which permitted less reliable forms of notice which were not reasonable in light of the inexpensive and more reliable alternatives such as mail service that were available. The same conclusion is required here. Notice only by publication to creditors did not satisfy due process regardless of the requirements of the state statutes. To the extent that the state statute permitted such published notice to be sufficient to cut off the right to contest a will, it should be held unconstitutional as a denial of due process of law.

The theory that the Indiana probate code which does not require notice to disinherited heirs is a denial of due process has been commented upon by Professor Debra A. Falender. An earlier work by her, *Notice to Creditors in Estate Proceedings: What Notice is Due?*, 63 N.C.L.Rev. 659 (1983) was cited by this Court repeatedly in *Tulsa Collection Services, Inc. v. Pope*, *supra*. She is also the author of *Henry's Indiana Probate Law and Practice* (8th ed.). In volume 1 of that treatise in § 307, she states:

In another situation, not expressly addressed by *Pope*, Indiana's absence of notice provision appears equally inadequate. Under I.C. 29-1-7-4, upon the probate of a will or the filing of a petition seeking probate of a will, no notice at all is to be given to heirs or to devisees under prior wills. If the *Mullane-Pope* notice standard is applicable in probate proceedings, it would seem that known or ascertainable heirs, who would be disinherited by that will, should be notified "by mail or other means as certain to ensure actual notice." The probate of the will is a judicial proceeding that will deprive the heirs of an interest in the decedent's estate if, in fact, the will was invalid and the heirs do not contest the probate within the statutory time. If the heirs or other interested parties, fail to initiate a contest with the contest period, their ability to contest is forever barred. The will contest period operates much like a creditor non-claim provision. It has attributes of a statute of repose or limitations, but it is not a self-executing statute of limitations. It is instead a time period initiated by the court's adjudication of the validity of a will, which should be sufficient state action to trigger the fourteenth amendment's due process requirements. Persons such as known or reasonably ascertainable heirs, whose property interests are affected by that court adjudication should be given notice, just as creditors whose property interests are affected by the opening of administration of a decedent's estate must be given notice of the proceeding that affects their rights. 1 *Henry's Indiana Probate Law and Practice* at 121-2.

The reasoning of Professor Falender is much sounder than that of the opinion at issue here.

The opinion by the Indiana Court of Appeals says that:

The interest vests, if at all, at death, (citation omitted), depending on whether, under the laws of this state, the person is entitled to a share in the estate. As already discussed, Phipps is not entitled to a share in the estate under Indiana law, therefore, she has no protected property interests for the purpose of her due process claim. 610 N.E.2d at 858.

It is respectfully submitted that this statement is circular and begs the question. The only reason that Mrs. Phipps did not have a right to share in the estate was because she did not receive notice of the probate of the will so as to be enabled to file a timely will contest. The opinion's statement is akin to telling a mortgage holder on property that was sold at tax sale that he has no right to complain that he was not notified of the sale when the time to redeem or protect such property has run because by then he had no property interest left to protect. Mrs. Phipps was the next of kin of the deceased. As such, she would inherit from the estate over $400,000 if the deceased died intestate. I.C. 29-1-2-1; *Todd v. Ehresman*, 132 Ind.App. 440, 175 N.E.2d 425 (1965).

A holding that actual notice to such a known person is required by due process eliminates or at least greatly reduces the possibilities of a person being able to profit from a will executed at his request by a person of unsound mind. The petitioner in this case wished to contest the will on the ground that the decedent lacked mental capacity and was subjected to undue influence. The executrix was the sole devisee under the will. The interest of the executrix in keeping the probating of the will from the appellant is apparent.

The burden of requiring actual notice to known persons who are cut off by a will from the inheritance they would have received had the decedent died intestate is not a heavy one. Section 3-705 of the Uniform Probate Code imposes such a requirement. 8 U.L.A. 321-2. That code has been adopted by at least 15 states. 8 U.L.A. 1993 supp. p. 1. This Court has concluded that it is not an unreasonable burden to require a search to be made for creditors of a deceased to collect in order to give the creditors of the deceased the notice required by due process before they loose their causes of action to seek payment. *Tulsa Collection Services, Inc. v. Pope*, *supra*. It would be much easier in the vast majority of cases to locate the next of kin of a deceased who would take under intestate secession than it is to locate all creditors. Yet the Court of Appeals of Indiana found that it was proper to deny such next of kin notice of the existence of a will which disinherits them so that they could have an opportunity to contest the will and preserve their right of inheritance. The decision that there was no denial of due process should not be allowed to stand.

Conclusion

The Court should find that to the extent Indiana Code §§ 29-1-7-4, 7 and 17 dispense with the requirement that notice be given to the person who would inherit under intestate succession of the probate of a will are unconstitutional as a denial of due process of law.

Respectfully submitted,

Daniel S. Davisson
DAVISSON & DAVISSON, P.C.
1111 Meridian Plaza
Anderson, Indiana 46016
(317) 643-6657

David W. Stone IV
STONE Law Office & Legal Research
26 W. 8th Street., P.O. Box 1322
Anderson, Indiana 46015
(317) 644-0331

Attorneys for Petitioner